DEPARTMENT OF STATE REVENUE

65-20200399R.LOR

Letter of Findings: 65-20200399
Indiana Oversized Proposed Assessment
For the Year 2018

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Indiana Department of Revenue's (the "Department") official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Motor Carrier failed to provide sufficient evidence that it should not be assessed the full civil penalty. Additionally, Motor Carrier's constitutional claims are beyond the scope of an administrative hearing.

ISSUES

I. Motor Vehicles - Oversized Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-1-1; IC § 9-20-1-1; IC § 9-20-1-2; IC § 9-20-4-1; IC § 9-20-18-14.5; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of an oversized civil penalty.

II. Motor Vehicles - Constitutionality.

Authority: *Timbs v. Indiana*, 139 S. Ct. 682 (2019); *Jones v. Flowers*, 547 U.S. 220 (2006); *United States v. Bajakajian*, 524 U.S. 321 (1998); *Austin v. United States*, 509 U.S. 602 (1993); *State v. Sproles*, 672 N.E.2d 1353 (Ind. 1996); *Clifft v. Indiana Dep't of State Revenue*, 660 N.E.2d 310 (Ind. 1995); *Ennis v. Dep't of Local Gov't Fin.*, 835 N.E.2d 1119 (Ind. Tax Ct. 2005); Ind. Const. art. III, § 1.

Taxpayer protests the constitutionality of the imposition of the oversized civil penalty.

STATEMENT OF FACTS

Taxpayer is a trucking company that was hauling machinery within Indiana. On October 8, 2019, the Indiana State Police ("ISP") examined Taxpayer's commercial motor vehicle and issued an oversized violation. Later, ISP informed the Indiana Department of Revenue ("Department") of the violation. As a result, the Department issued Taxpayer a proposed assessment for being oversized without a permit in the form of a "No Permit Civil Penalty." Taxpayer protested the assessment of the civil penalty. The Department held an administrative hearing, and this Letter of Findings results. Further facts will be provided, as necessary.

I. Motor Vehicles - Oversized Penalty.

DISCUSSION

ISP reported that the driver did not have a permit on phone or a hard copy. Driver claimed to have applied for a permit an hour before the stop. The ISP officer spoke with the Department and was advised that a permit for that day would not have been approved due to the route selected by Taxpayer's permitting service. The Department verified that no permit was in place at the time of the stop.

As a threshold issue, it is a taxpayer's responsibility to establish that the existing proposed assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "[t]he notice of proposed assessment is prima facie evidence that the [D]epartment's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of*

State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department notes that, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision shall be entitled to deference.

According to IC § 9-20-1-1, "[e]xcept as otherwise provided in [IC Art. 9-20], a person, including a transport operator, may not operate or move upon a highway a vehicle or combination of vehicles of a size or weight exceeding the limitations provided in [IC Art. 9-20]."

According to IC § 9-20-1-2, the owner of a vehicle "may not cause or knowingly permit to be operated or moved upon a highway [in Indiana] a vehicle or combination of vehicles of a size or weight exceeding the limitations provided in [IC Art. 9-20]."

IC § 9-20-18-14.5 authorizes the Department to impose civil penalties against Taxpayers that obtain a permit under IC Art. 9-20 and violate IC Art. 9-20 ("Permit Violation Civil Penalty") or are required, but fail, to obtain a permit under IC Art. 9-20 ("No Permit Civil Penalty"). IC § 9-20-18-14.5(c) provides that a person "who transports vehicles or loads subject to this article and fails to obtain a permit required under this article is subject to a civil penalty . . ." According to IC § 9-20-18-14.5(b), the Department may subject a person to a civil penalty if the person "obtains a permit under" IC Art. 9-20 and violates IC Art. 9-20 by being oversized or overweight.

IC § 6-8.1-1-1 states that fees and penalties stemming from IC Art. 9-20 violations are a "listed tax." These listed taxes are in addition to and separate from any arrangement or agreement made with a local court or political subdivision regarding the traffic stop.

In this case, the Department issued Taxpayer a "No Permit Civil Penalty." According to the ISP report, Taxpayer transported a machine that was oversized by more than the amount allowed under IC § 9-20-4-1.

According to Taxpayer, the driver's understanding was that he had a permit at the time of the stop. Taxpayer uses a permitting service to coordinate its permit needs. Taxpayer provided a call log showing multiple telephone calls between a representative of Taxpayer and a representative of the permitting service, more than an hour before the driver was stopped. Taxpayer had to reapply for the Indiana permit. By the time the reapplication was processed on November 9, 2019, the traffic violation was already recorded in the Department's system, and the reapplication was denied due to the selected route.

The Department notes that Taxpayer is required to have a permit for carrying loads that exceed statutory limits at the time of transport. This allows the Department to provide Taxpayer a route safe for transport. Taxpayer did not have a permit on their vehicle at the time of the traffic stop, and therefore was correctly assessed a No Permit Civil Penalty.

In addition to providing Taxpayer an opportunity to protest, IC § 9-20-18-14.5 provides "not more than" language to the Department when generating a proposed assessment amount. While Taxpayer did attempt to get a permit prior to beginning its travels, it did not actually get a permit. In this case, the Department is within its bounds to issue the full No Civil Permit Penalty.

FINDING

Taxpayer's protest is denied.

II. Motor Vehicles - Constitutionality.

DISCUSSION

At the hearing, Taxpayer stated that it believes the proposed assessment is improper, fundamentally unfair, and unlawful. Moreover, Taxpayer asserts that the No Permit Civil Penalty is disproportionate to the underlying offense and thus unconstitutional.

Taxpayer cites the recent United States Supreme Court opinion of *Timbs v. Indiana*, 139 S. Ct. 682 (2019), which found that the Eighth Amendment's Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment. This means that the Department, like the IRS and other Federal agencies, is

constitutionally limited in its ability to impose sanctions as punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998). A civil sanction is considered a punishment for an offense when it "cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes . . . ." *Austin v. United States*, 509 U.S. 602, 621 (1993)(*emphasis in original*)(*internal quotations omitted*).

For a punishment to be considered constitutionally excessive, it must be "grossly disproportional to the gravity of [an] offense." *Bajakajian*, 524 U.S. at 334. In making this determination, substantial deference is given to the authority of state legislatures for determining the appropriate punishment for different types of violations. *Id.* at 336. Furthermore, the inherent imprecision in determining the severity of an offense means that strict proportionality is not required. *Id.*

Taxpayer argues that the penalty at the heart of this case is grossly disproportional to the offense. However, Taxpayer has submitted no evidence supporting these claims. Taxpayer provided no civil engineering studies, expert witness reports, or other analysis to show the actual damage done by an oversized vehicle on an Indiana highway. Without showing that the penalty in question goes beyond the funds necessary to remedy damage caused by the violation, Taxpayer cannot prove that the penalty is a punishment.

Even assuming that the penalty at issue is a punishment, it is not constitutionally excessive. The Indiana Legislature is given substantial deference in its ability to set penalties for operating an oversized vehicle without a permit. The penalty in this case did not go beyond that statutory authority. Furthermore, Section 1 of this determination modifies the penalty based on the specific facts and circumstances in this case. The Department therefore is issuing an assessment proportionate to Taxpayer's specific violation. By doing so, the Department goes beyond the constitutional requirement to avoid gross disproportionality discussed by the Supreme Court in *Bajakajian*.

Beyond incorporating the Excessive Fines Clause and other Bill of Rights guarantees, the Due Process Clause of the Fourteenth Amendment "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006)(*internal citations omitted*). This is distinct from actual notice, which is not constitutionally required. *Id.*

The Indiana Supreme Court has previously reviewed the Department's process and found that it provided the opportunity for due process.

> Once assessment occurs, a taxpayer may protest his [] liability to the Department. It, in turn, conducts an administrative hearing within which the taxpayer may present evidence and make his case. [] Some time after the hearing, the Department issues its findings, upon which a dissatisfied taxpayer may base his appeal to the Tax Court.

Clifft v. Indiana Dep't of State Revenue, 660 N.E.2d 310, 317 (Ind. 1995). As applied in the *Clifft* case, the Department's administrative procedures were found to "afford review in a meaningful time and in a meaningful manner which comports with the Fourteenth Amendment." *Id.* at 318.

The Department notes that it has anticipated several Due Process concerns, including the length of time between the inspection and the issuance of the Proposed Assessment, the Assessment being sent by standard mail, and the lack of a signature or telephone number on the Assessment. Indeed, Courts have ruled already that several of these concerns do not amount to a Due Process violation. *See, e.g., Clifft* 660 N.E.2d at 318 ("mere postponement of the opportunity to be heard is not a denial of due process if the opportunity ultimately given is adequate.") *and Ennis v. Dep't of Local Gov't Fin.*, 835 N.E.2d 1119, 1123 (Ind. Tax Ct. 2005) (standard mailing not only provides sufficient constitutional notice, but "a presumption arises that such notice is timely received.") Taxpayer in this case did, in fact, receive notice and timely protested the Proposed Assessment. Taxpayer successfully submitted its appeal of the penalty at issue, attended an administrative hearing, presented its arguments, and will be afforded the opportunity to appeal this decision pursuant to IC § 6-8.1-5-1(h). There would be no support for Taxpayer's potential claims of a Due Process violation in this case.

Although the Department believes its actions and the relevant statutes are constitutional, that finding is ultimately outside the scope of this determination. The Department does not have the authority to strike down tax statutes. Ind. Const. art. III, § 1. Indeed, the Indiana Supreme Court has explained that, "[c]onstruing the state and federal constitutions is not the job . . . of the Department of State Revenue." *State v. Sproles*, 672 N.E.2d 1353, 1360 (Ind. 1996). Thus, without the authority to grant the relief requested on these Constitutional claims, the

Department denies the Taxpayer's protest.

Next, Taxpayer claims that the Department published guidance on its website that contradict its actions in this case. In a letter provided with its protest, Taxpayer quoted the Department's website, which Taxpayer claims should bind the Department to a maximum of a $500 penalty:

> Oversize/Overweight (OSW) Civil Penalties
>
> An individual with or without an Oversize/Overweight Permit who violates Indiana Code Article 9-20 is subject to the following civil penalties:
>
> • Not more than $500 for the first violation,
> • Not more than $1,000 for each subsequent violation . . . .

Taxpayer claims that the phrase "with or without" requires the Department to reduce the penalty in this case. The Department notes that Taxpayer has not completely and accurately reproduced the above quote from the Department's website, as denoted with ellipses. In fact, a review of the Department's records establishes that the website included three bullet points explaining the civil penalties and read as follows:

> Oversize/Overweight (OSW) Civil Penalties
>
> An individual with or without an Oversize/Overweight Permit who violates Indiana Code Article 9-20 is subject to the following civil penalties:
>
> • Not more than $500 for the first violation,
> • Not more than $1,000 for each subsequent violation, and
> • Not more than $5,000 for each violation for failure to obtain a permit.

The Department's website stated that a $5,000 penalty is the maximum for each violation for a failure to obtain a permit, regardless of the number of prior or subsequent violations. The Department recognized the potential for confusion arising from this joint discussion of the penalties for permit violation and penalties for the failure to obtain a permit. To add clarity, the Department modified the language on its website in March of 2020 to read as follows:

> Under Indiana Code (IC) 9-20-18-14.5(b), a person (or company) who obtains an OSW permit and violates Indiana Code 9-20 (including violation of permit guidelines) is subject to a civil penalty of not more than $500 for the first violation and not more than $1,000 for each subsequent violation.
>
> Under IC 9-20-18-14.5(c), a person (or company) who transports vehicles or loads under Indiana Code 9-20 and fails to obtain the required permit(s) is subject to a civil penalty not more than $5,000 for each violation.
>
> https://www.in.gov/dor/motor-carrier-services/oversizeoverweight-osw (Last Visited 3.15.2021 at 10:00am).

This new language makes it clearer that the $500 and $1,000 penalties are for violations of already-obtained OSW permits. That clarification, however, does not change the meaning of the previous language, which separately states the penalty for "each violation for failure to obtain a permit." The Department is bound by the Indiana Code and its regulations, not by quotes pulled from its website and modified to fundamentally change their meaning.

In conclusion, Taxpayer's reliance on the misquoted Departmental website is misplaced. Further, Taxpayer has not established that the penalty at issue in this protest is unconstitutional. The Department relied on existing tax statutes and has no authority to strike those statutes down.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest is denied.

April 20, 2021

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An html version of this document.